No. 287 & 439.

Petition for Rehearing.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

A. M. THOMAS, ET AL.,
Appellants,
Against
D. P. GAY, ET AL.,
Appellees.
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PETITION FOR A REHEARING.

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PETITION FOR A REHEARING.

To the Supreme Court of the United States:

Your petitioners, the appellees in the case first above entitled and the appellants in the case second above entitled, respectfully pray for an order directing the rehearing of such cases, upon the following ground:

It is respectfully suggested that the court misapprehended the nature of the objection urged against

the taxes levied for purely county purposes in Kay county on property located in the Indian reservations, and has dealt with the question upon the supposition that the essence of the objection to these taxes is based upon a want of actual interest; whereas the real objection to these taxes rests in the fact that the attempted taxation for county purposes is an attempt to tax property located beyond the boundaries of the county, and that for this reason there is a want of that legal interest in the taxes which characterizes the attempt as the taking of private property for private purposes, and not due process of law; and it is furthermore respectfully suggested that, in the citation of authorities where it is claimed similar taxation has been upheld, the court has overlooked local conditions under which such decisions were rendered, which make the facts in the authorities cited entirely dissimilar from the facts in the case at bar, and render such authorities wholly inapplicable to the present case.

It was and is still urged that it is not competent for the legislature to authorize any municipality or municipal subdivision to tax property and persons beyond the territorial jurisdiction of such municipality or subdivision, and which the facts of the case at bar disclose an attempt to do.

Counsel submit a paper annexed hereto, enlarging the ground herein stated with the utmost brevity consistent with the importance of the subject matter,

and earnestly ask a reconsideration of the case upon the point herein suggested, and if this petition shall seem to the court to merit full consideration, that said cause may be reheard and reargued and the former decision revised and modified as the further consideration by the court of the case may require.

Henry Ewbank and
John W. Shartel

Counsel for Gay & Reed, et al.

We hereby certify that, in our judgment, the above and foregoing petition for rehearing is well founded.

Henry Ewbank and
John W. Shartel

Counsel for Gay & Reed, et al.

GROUNDS UPON WHICH A REHEARING IS ASKED.

In the second assignment of error of the petitioners it is specified, "*because the said Osage and Kaw Indian reservations * * * are no part of said Kay county for the purpose of taxation or for any municipal purposes whatever*" (printed record, p. 57), and in their brief, on page 47, responding to this assignment, it is claimed: "*and the said Indian reservations not being within the geographical boundaries of either of said counties, and the taxing of the holders of said property by the counties of the Territory is taking the property of persons holding property on said Indian reservations for the benefit of the residents of said counties, and is taking private property for private purposes.*" The Court, however, esteemed this objection to be of the following effect only, as expressed in the opinion: "*The most fundamental of these objections is found in the assertion that, so far as non-resident owners of cattle grazing within the Indian reservations are concerned, it is taxation without representation, and that such persons derive no benefit from the expenditure of the moneys accruing from the taxes.*"

The fact of the non-residence of the owners of this property was not introduced on the record as having any special bearing upon the question which we now urge, but was made the basis of the claim only that their property was taxed higher than the

property of the residents of the territory under the peculiar method of assessment adopted, and hence was taxing the property of non-residents higher than that of residents, in violation of the organic act of the Territory. The fact of the non-residence of the petitioners has no further bearing on this question than to show that neither their persons nor their property were within the geographical limits and territorial jurisdiction of the County of Kay, and for the purpose of this objection it is wholly immaterial whether they reside in some foreign state or within the boundaries of the Indian reservations, so long as neither their person nor property are within the boundaries of that county. No claim is made by the petitioners that it is taxation without representation or taxation without benefit, in the sense in which the application of that doctrine is denied in cases of aliens, non-residents or corporations, which have no palpable or direct interest in a tax, where the property is actually within the existing jurisdiction, conditions which are disclosed in Meyer v. Grama, 8 How., 492; Witherspoon v. Duncan, 4 Wall., 210; Kelley v. Pittsburg, 104 U. S., 78; Anesbury Nail Co. v. Weed., 17 Mass., 52, and other authorities cited in the opinion. These cases all present a legal interest in the purpose for which the tax is expended, though there may be an accidental want of tangible or apparent interest, as where a non-resident or an alien is taxed or as where a corporation is taxed for the support of

schools, their property being located within the territorial limits of the municipality in which the tax is expended. We intended to raise no such objection to this tax as is met by these decisions. What we do and did intend to assert is that when the boundaries of a municipality are passed, all legal interest in its institutions disappears. The distinction between taxation of persons and property in a municipality, who have an accidental want of apparent interest in the subject of the tax, and the attempt in the present case, is sought to be pointed out on page 80 of the brief of counsel, where it is said, "the taxation here is not analogous to the taxation of the property of a married woman," etc.

The allegations of the bill in this case with reference to the county taxes are substantially identical with those in Farris v. Vannier, 6 Dak., 186 (41 N. W. Rep., 31). In that case an unorganized county was attached to an organized county by the legislature for "judicial purposes." Subsequently, without the imposition of any other bond of union between the unorganized and organized counties, an attempt was made by the legislative authority to tax property located in the unorganized county for the support of the government in the organized county. It was held in this case that the attachment for judicial purposes did not have the effect to unite the two sections of country territorially for any local municipal purpose, and that the case presented a case of extra ter-

ritorial taxation, and the law was declared void as taking private property for private purposes.

We deem it to be well settled that the legislature cannot constitutionally authorize any municipality or subdivision to tax property located beyond its boundaries, because such taxation is taking property for private purposes, and is not due process of law.

"But such a burden would be inadmissible also, for the further reason that as to any property or person outside the district in which the tax was levied, the want of legal interest in the tax would preclude its being subjected to the burden." (Cooley on Taxation, 159.)

"There can be no question that an assessment of taxes, to be valid, must be within the jurisdictional limits of the taxing power and by the proper officer of the district or county where the taxes are levied." (People v. Wilkerson, 1 Idaho, 619.)

"But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction for their own local purposes."

Wells v. Weston, 22 Mo., 384.

Among other leading authorities denying the power of the legislature to authorize any municipality or subdivision to tax beyond its boundaries are:

City of St. Charles v. Nolle, 51 Mo., 122.

In re Town of Flatbush, 60 N. Y., 398.

Morford v. Unger, 8 Iowa, 82.

Sleight v. People, 74 Ill., 47.

Ryerson v. Utley, 16 Mich., 276.

Cheaney v. Hooser, 9 B. Mon., 341.

Bradshaw v. Omaha, 1 Neb., 16.

Territory v. Daniels (Utah), 22 Pac. Rep., 159.

We, therefore, think the validity of this tax depends on whether the attached territory is actually or virtually a part of the County of Kay; if it is, it is taxable for the support of its government; otherwise, not.

This principle is not at all inconsistent with the authorities cited in the opinion in this case, to wit:

Ry. Co. v. Fisher, 116 U. S., 28.

Ry. Co. v. Arizona, 156 U. S., 347.

Rld. Co. v. Peniston, 18 Wall., 5.

Cattle Co. v. Faught, 5 S. W. R., 494.

Philpin v. McCarty, 24 Kans., 393.

Kempner v. McClelland, 19 Ohio 308.

Hilliard v. Griffin, 33 N. W. R., 156.

Comins Twp. v. Harrisonville Twp., 45 Mich., 442; 8 N. W. Rep., 44.

Ry. Co. v. Fisher and Ry. Co. v. Arizona are entirely beside the question, for there the controversy concerned only the right to tax property in Indian reservations lying within the exterior boundaries of a county, and presented no question of extra territorial taxation.

We do not think that the case of Rld. Co. v. Peniston ought to be invoked as an authority on this

question, because that controversy only involved, first, whether the Union Pacific Railroad is a federal agency not subject to state taxation; and, second, whether that part of the road lying within the unorganized counties was taxed in the proper county, as a matter of construction of state law, and not as a question of power to enact such laws. The only claim made in the assignment of error in that case was as to whether this taxation is "valid and lawful under the legislation of the state." From the brief of counsel, on page 13 of the report of this decision, it further appears that the only question urged in this respect was a matter of construction of local law, and it therefore appears quite plain that the question presented here was in the mind of neither court nor counsel. Had it been, and had that decision resulted in a specific affirmance of the power of the legislature to tax property in that instance, it would still not be an authority in point here on account of a dissimilarity in local conditions. There the legislature had unquestioned power to make these unorganized counties a part of the organized counties. The attachment in that instance was for judicial and revenue purposes, and in effect made the unorganized county a part of the organized, at least for those purposes, as it appears by the Revised Statutes of Nebraska of 1860, sec. 226, that "the counties so attached shall be deemed to be within the limits of the county to which they are or may be annexed and form a part thereof."

The case of Hilliard v. Griffin, supra, is a Nebraska case and throws additional light on the local conditions concerning the junction of organized and unorganized counties and the effect of such union in that state, and in this case no question was raised like that in the case at bar, but the only point involved was as to what officials should collect the taxes remaining due in the unorganized county after it became an organized county. Neither was any question of extra territorial taxation raised in the case of Cattle Co. v. Faught, supra. There was a constitutional provision in the State of Texas that the property of non-resident owners should be taxed in the county where the same is located. The question there was whether property located in an unorganized county should be taxed in the county to which it was attached, or, should the tax be paid at the capitol of the state. It was held that the course of legislation in respect to the attachment of unorganized to organized counties made the unorganized counties substantially a part of the county to which it should be attached, and that therefore the taxes were collectible in such organized county. The question of the power of a municipality to tax property beyond its boundaries could not be involved in this case, nor is such power affirmed to exist, because the court premises in respect to the territorial union of the organized and unorganized county, "our legislature has almost uniformly treated an unorganized

county as part of the county to which it is attached for judicial purposes, so far as the exercise of local governmental powers over it is concerned." On the other hand, the opinion clearly assumes that the mere attachment for judicial purposes alone would not unite the two communities in any municipal sense.

Philpin v. McCarty, supra, presented no question of extra territorial taxation, as the only questions involved in that case were, (1) that the constitutional provisions of the state requiring an act of the legislature to contain only one subject, which shall be expressed in its title, is mandatory, and (2) that the act in question complies with the requirement. The law under consideration there created unorganized counties into a municipal township of the organized county to which it should be attached, and Brewer, J., in delivering the opinion of the court, expressly disclaims any intention to pass on any other question by saying: "No question is made of the power of the legislature to enact such a statute, but the point of challenge is in the title to act in which this section is found." From the act of the legislature involved in this decision, it appears that the unorganized county, by virtue of the act, is placed within the geographical limits of the organized county, and had the point been adjudged that this tax were valid against this objection, the conditions are so dissimilar that it would not be an authority in point in the present case.

Kempner v. McClelland's Heirs, 19 Ohio, 308, presented an actual union of two counties in fact for every purpose. The officers of the organized county were made ex-officio officers of the unorganized county, and the revenues collected in the unorganized county were expended therein for the benefit of its inhabitants. The decision presented nothing but a question of construction of local law, and involved no question of extra territorial taxation.

Comins Twp. v. Harrisville Twp., supra, presented no question like that involved here, being purely a matter of construction of local law, and from the facts of the case, it is seen that the unorganized county there was attached to an organized county, both for "judicial and municipal purposes," and became a part of a township of the organized county, and upon being created a separate township of the organized county, brought action to recover that part of the revenues of the current year collected in its territory by the township of which it formerly composed a part, and its right to recover denied as a mere matter of construction of local statutes.

The effect of attaching unorganized country to an organized county for "judicial purposes," by an act of the legislature, is elaborately discussed by the Supreme Court of Montana in Co. Commrs. v. Northern Pacific Rld. Co., 25 Pac. Rep., 158, where it was held that such annexation alone carried with it the

right to exercise no municipal control over the attached territory, either for revenue or any other purpose not strictly judicial in its character. The authority to tax under such conditions was denied.

So, also, in the case of State v. Co. Commrs., 1 So. Dak., 292 (46 N. W. Rep., 1127), it was held that "a law attaching the unorganized counties of Nowlin and Stirling to Hughes county 'for judicial purposes' did not have the effect of so attaching for election purposes, such act being at once a grant and a limit of jurisdiction."

Now, the attachment of this unorganized country to the counties of the Territory was not even vested in the legislative, but in the judicial power, and is a direct denial of the authority of the legislature to deal with the same matter in the same respect, and if the law in the present case should be upheld, under a late order of the Supreme Court of the Territory transferring all these reserevations to Pawnee county for judicial purposes, would present the spectacle of the people in these reservations paying taxes in one county and attending court in another, or, if the act of the legislature contemplated a change of the place of taxation, with the change of the attachment of the unorganized country to the organized counties for judicial purposes, would present a clear case of actual change of taxing districts by the judiciary of the Territory. These suggestions are made as merely illustrative of the consequences which will flow from the assump-

tion that the attachment of the unorganized country to the organized counties for judicial purposes embraces the idea of extension of the municipal jurisdiction of the county over such attached territory.

Other authorities bearing on the question as to what is imported by the attachment of territory to an organized municipality for judicial purposes are cited on page 26 of the petitioner's brief. No case can be found where taxation of attached territory has ever been based upon as slender a bond of union between the organized and unorganized sections of the country as a mere attachment for judicial purposes, and if it be assumed that all of the authorities cited in the opinion had specifically dealt with a claim of extra territorial taxation, such claim could have been easily met in each instance by showing that while the territory in question was nominally attached for judicial purposes by other legislation, it was made in fact a part of the organized county. Here the unorganized territory is attached solely for judicial purposes, without the imposition of any other bond of union, and with the legislative authority which attempted to impose this tax, powerless as is seen, to impose any additional bond of union or to make the unorganized country a part of any of the organized counties of the Territory of Oklahoma, either directly or indirectly. The conditions under which the authorities cited in the opinion were decided do not obtain in the present case, and cannot obtain in this case for the

want of power in the legislature of the Territory to make these reservations substantially a part of any organized county.

In the opinion in this case it is justly observed by the court: "The legislature was authorized to change the boundaries of the original counties, but were not given authority to include these Indian reservations or any lands not then opened to settlement in any of the counties." This expression is even stronger with reference to the counties of the Cherokee Outlet, of which Kay county is one of the counties, than it is with reference to the original counties of Oklahoma, for by the act opening the Cherokee Outlet to settlement, congress itself, with the aid of the Secretary of the Interior, established county boundaries, and the legislature was given no authority to change them. (27 Stat. L., p. 645.) So that the want of power in the legislature of the Territory in the present case is met by two inhibitions: One, the want of authority to incorporate unorganized country in any organized county—and what they could not do directly, of course they could not do indirectly—and the other is that the boundaries of Kay county were established by the act of congress, and the legislature has no authority to add any country, organized or unorganized, thereto. The legislative authority of the Territory, however, have never attempted to impose any of the local governmental functions of the counties upon these Indian reserva-

tions, nor attempted to make any of these reservations a part of any organized county.

We therefore earnestly ask the Court to reconsider the case upon this proposition, believing the Court did not intend to consciously hold it to be within the competent authority of the legislature to tax property for the benefit of a municipality which has its situs beyond the boundaries of such municipality, and believing that, if the opinion heretofore rendered in this case should remain unchallenged in this respect, it might be open to the possibility of such a construction and be the means of introducing a dangerous principle in the constitutional interpretation of the authority of the legislatures in distributing public burdens and imposing them upon classes who owe no duty to the institutions for whose support they are taxed, and have a tendency to create an impression that might lead to the attempt on the part of legislative authority to show no regard for the boundaries of its municipalities in the authority for taxation for the support of their institutions.

Respectfully submitted,

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